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ABSTRACT

This paper discusses international law's nature and role and suggests that it can be studied from a number of different perspectives. The major topics include: (1) internationally relevant domestic law; (2) the relationship of law to justice; (3) international law's status and legitimacy; (4) the rights of governments, corporations, and individuals; (5) the formation of international law and internationally relevant domestic law; (6) the use of international law; (7) the teaching and course content of international law; (8) the differences in teaching about public and private law; and (9) the roles of political regimes and institutions in international law's evolution. It is emphasized that political science students should clearly understand the difference that exists between accepted law and its efficacy, on one hand, and the location and formation of law in the larger whole on the other, and that both subjects should be taught in law schools. (JHP)

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THE CONTENT OF INTERNATIONAL LAW COURSES
IN DEPARTMENTS OF POLITICAL SCIENCE: SOME COMMENTS

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invited)

My intervention consists of a number of suggestions for our consideration. These constitute an attempt to wade through the stimuli and materials that I have encountered during my study and teaching of International Law. Underlying these suggestions are two more basic problematics regarding the nature of the state and the distinction between public and private law.

These suggestions aim at both reclaiming the ground that the study of international law has, improperly, lost with respect to the study of regimes and institutions and at inducing a discussion about the nature and role of international law.

International law may be viewed from a number of angles. I suggest that we may study and teach IL in terms of its nature, formation, use, and content. Before dealing with those dimensions, however, I would like to suggest an expansion of the scope of legal matters that should concern political scientists.

Internationally Relevant Domestic Law (IRL)

We take it for granted that the domestic formation of international legal policy responds not only to domestic factors but, also, to international factors. The distinction between foreign policy and international politics, however, leads us to consider as international law par excellence, only those items and aspects which transcend the jurisdictional boundaries of a country and involve other governments. Law which is applicable only within domestic jurisdictions is not considered as

International Law. Perhaps, however, a valid distinction may be drawn between those aspects of domestic law which directly or indirectly affect international relations -internationally relevant law- and those which do not.

Law that regulates relations among the states of the Union in the USA may be said to have limited relevance for international politics; laws, however, that impact on investment, trade, financial transactions and the quantity of money, the movement of labor or industrial ecostandards have a direct impact on world politics. Properly speaking, the legal/political foundations of the contemporary world are largely based on IRL. The determination of nationality, for example, and the consequent set of rights and powers vested in the state, is primarily IRL rather than negotiated IL.

If law, in general, and international law in particular, are defined as strictly consensual, then internationally relevant domestic law cannot be considered as international law. If, however, law is defined to involve an element of 'coercion' then this kind of domestic law may be worth our consideration in courses of International Law. This may lead us to the examination of how different countries respond to various stimuli through their own domestic legislation and without recourse to international agreements and legal instruments. Such IRL may or may not reach the status of IL; it is, however, a legal response with an impact on the world system.

There is a complementary reason why the creation of such

domestic law may be worth our time. This is so because of the impact that such law may have on the primary unit of international politics, i.e., the state. While we may conveniently capture a number of policies under the rubric of 'state policy' we need also guard against the reification of the concept of 'state'. The study of the formation and application of both IL and IRL (along with domestic law) can alert us to developments which a) involve agents other than the government and its institutions (the state) and b) the generation and/or legitimation of principles or privileged spheres within which operate agents and processes that weaken (or strengthen) the role of the state apparatus.

The Nature of International Law.

There is an ongoing controversy regarding the 'critical' school of legal thought. This school argues that law is not solely a system of rules and procedures which establish legality; law also embodies and reproduces social relations. At the international level the tradition of statism has insulated us from thinking of International Law as a neutral, procedural system. International Law is thought of as an attempt to reconcile competing interests of unequal states or, more recently, as an attempt to identify universal principles and processes that should direct legal and political action. Yet, in both cases, the quest is centered around accommodating or circumventing the 'state'.

A great deal of this quest is conditioned by the general view that International Politics is characterized by anarchy, i.e. lack of a legitimate central authority with enforcement powers. Many also recognize, however, that anarchy does not imply the absence of order. The meaning of order is beyond the scope of this intervention. If, however, we consider order to imply that there exist global structures, processes and agents which create a kind of global civil society then we may think of International Law as generated by and impacting on that larger totality. For example, if we follow Wallerstein's world-system and commodity chain arguments, then we are accepting the existence of such an order. Similarly, if we follow Strange's suggestion of global financial or knowledge structures we also accept that there exists such an order.

The relationship between law and justice is always worth investigating. What seems to me to be equally relevant, however, is the question of whether international law is an instrument of consent, force or power. Evidently, whenever an agent adheres to a particular law it expresses its consent. However, it may be worth our time to distinguish the consent of equals from that of unequals. When adherence is the result of force we may think of it as illegitimate. Illegitimacy is not necessarily immoral; it simply implies that one or more of the parties will follow only if others use force. For example, the views of the USA regarding the extent and uses of the TS are not legitimate from the view of Argentinians or the Brazilians or the Soviets. As a consequence,

the US has been actively upholding its views. The issue of legitimacy, therefore, is not one of fairness or justice but one of acceptability. On the other hand, an agent may recognize a benefit or superior necessity in adhering to a legal agreement or principle. In such an instance the costs of enforcement are minimized as is the potential for conflict. Yet, legitimacy does not imply equality or fairness. Freedom of the high seas had long been legitimate; it was neither fair nor egalitarian, however.

International Law and Legitimation. Force and negotiated collaboration are the major means of interaction among agents which are insulated from each other, particularly, if those agents are in serious conflict.

If one accepts that there exists a world-economy or global economic structures, which include both private and state owned firms, then the autonomy (or sovereignty) of states exists within a global civil society. This civil society allows the deployment of rights - primarily property rights- which may not be congruent with the strengthening of state sovereignty. Accordingly, we can study the nature of this global order as consisting of both the deployment of superior capacity and the acceptance of certain behaviors or principles as legitimate.

The creation or reproduction of legitimate orders implies both the existence of an agent(s) whose priorities are central and a network of rules, principles or regulations which co-opt other agents and thus do not require the continuous and costly exercise of force. Co-optation, however, is not without its

costs. These may be in the form of evident payments or in the form of recognizing a privileged sphere within which non-governmental agents may operate. In the long run, such a privilege may undermine the legitimacy of an order. In our times, corporations - including state-owned ones - operate, largely, within the parameters of private, commercial law. The capacity of governments to regulate these transactions often end at the edge of nationalization. A contradiction is inherent, therefore, in the relationship between government and business in countries or regions where these co-exist as a matter of law and political economy. To obscure this structural contradiction by referring to all policies as 'state' policies reifies the state and precludes us from observing the trends in one or another direction.

Governments, Corporations and Individuals. We may go one step further, perhaps, and include the human rights of natural individuals - as distinct from juridical ones - as a constitutive element of the international legal order. Inasmuch as domestic legal policies recognize a sphere within which individuals can operate autonomously, individuals may also shape international legal policy.

One cannot be too happy about the status of individual human rights worldwide. Yet, the teaching of the International Law of Human Rights - broadly construed to include civil and socioeconomic rights - does not have to be solely an analysis of the degree to which governments allow various privileges to their

citizens. Human rights have been used, and can be used, as an alternative foundation for a law of individual - as distinguished from citizen rights.

Again, we may wish to examine the degree to which particular legal developments in human rights strengthen or weaken state agencies or private bureaucraties, i.e. the degree to which what we observe is an exercise of 'state' power or the consolidation or weakening of an order within which governments and corporations are primary.

Such an approach, moreover, suggests that the distinction between corporate and non-corporate individuals (particularly natural individuals) should be made clear.

In this context I would like to suggest that instead of using a subject-object categorization we may use an agent-subject-object triad. Accordingly, agents legislate -in our time mainly states- subjects have standing -states, some IGOs, corporations, individuals, etc.- and objects are concepts such as boundaries, nationality, the environment, etc., whose legal nature is the product of the interactions of both agents and subjects. (By including IRL it is easier to see how individuals and corporations can have standing.)

The Formation of IL and IRL.

The question of the formation of IL clearly, but not exclusively, touches upon the question of the sources of IL, as enumerated in Article 38 of the ICJ statute. What I have in mind,

however, is the study of the historical and social processes through which IL is generated or declines.

The formation of IL and IRL may be examined both in terms of their causes and in terms of the formal arenas within which they are produced. Causes may be primarily endogenous or may be immanent in bilateral or multilateral processes. In terms of the formal arenas, IL is produced both domestically -as an adjustment to some legal instrument already existing- and internationally, through negotiations. Emphasizing only the latter deprives us of an immediate study of the specific social forces and institutions involved in law formation at the local level.

International Law policy, i.e., particular legal positions held by individual countries or groups of countries, could be considered as one type of political outcome. Although it is a specific type of outcome, and may be differentiated from economic, administrative, political or social policies, it is hardly possible to imagine any non ad hoc arrangement that is devoid of some legal provisions. Moreover, the specific language and scope of legal provisions are generally the object of contestation.

What would be the purpose of studying the semantics of legal negotiations? One clear purpose that I see lies in the significance of language as a means of strategy. A prominent example of this consists of the statements of the various groups of countries regarding the question of 'sovereignty over natural resources.' Another reason is in the identification of the

particular interests included in international legal arrangements through the shaping of generalized legal discourse. An example of this are the arguments on the responsibilities of 'flag of convenience' states.

The formation of IL and IRL may also be studied as that of a policy output. Accordingly, we would then examine whether it has been implemented or not and how. I wish, however, to point out that the distinction between outcome and output is excessively instrumental inasmuch as it bypasses the function of particular legal arguments in setting the agenda -an outcome in my view- far before any outputs have been reached.

While the formation of IRL can be studied only within domestic political processes, it is still the product of both endogenous and exogenous factors; in this sense it may be studied as the outcome of both of these dimensions.

The Uses of International Law

It would be folly to argue against the fact that IL and IRL are more often than not instruments of foreign policy. This situation underscores the fact that domestic juridical systems are more cohesive than IL during this point in time. Yet IL and IRL provide a particular range of 'understandable' discourse -a problematic. This is mostly due to the extant global inter-subjectivities but it also reinforces these inter-subjectivities.

In some respects, then, IL is multipurpose. It may be a means of adjudication, agreement and predictability and an

instrument of foreign policy. It also has a structural use (function perhaps would be a better term). Its structural use becomes apparent to the degree that it provides a common set of principles around which divergent policies and strategies are manipulated. If every country or every corporation were to promote its interests in terms of a different legal language the chances for interaction would be non-existent. The fact that the language is articulated around contested but commonly understood principles suggests both the underlying level of integration and the hegemonic role of that particular set of rules. When, and if this is not so, then we should concentrate on the study of competing legal 'problematics'.

The Content of International Law

In my view, the teaching of international legal issues in departments of Political Science should emphasize questions regarding the sociological and historical nature of IL and IRL. It must also emphasize the formation of IL and IRL by reference to factors other than law itself, i.e., it must be studied as one type of policy outcome. The uses of IL and IRL are also a necessary component. Political scientists can examine these uses both in terms of their instrumental and structural properties.

In this last part, I want to turn to two questions that may also have an impact on the content an IL curriculum. First that of the distinction between private and public law and, second, that of regimes and IL.

Undoubtedly the IL among states is a central and proper point of concern. It must remain the object of study of political scientists. It is unnecessarily self-restraining, however, to define ourselves out of what is commonly known as 'private' international law. While I personally favor a total integration of these two laws as constituent elements of any social order where property rights are deployed, this is not an assumption necessary for the introduction of private IL issues in the Political Science curriculum.

Corporations and the Public/Private Dichotomy. Corporations are globally deployed and develop policies of their own, including alliances similar to alliances among governments. Business entities from socialist countries may also be expected to behave in a similar fashion if commercial activities cease to be covered by sovereign immunities. Already, many government owned corporations are basically operating in the same ways as privately owned ones.

International Law courses in political science departments deal primarily, if not exclusively, with public law. Public law is defined as law among states, since the 'state' has been defined as the embodiment of the public sphere. Private IL in turn, covers primarily economic transactions among private or autonomous state owned corporations. Two theoretical points illustrate the problems inherent in the perpetuation of this distinction by political scientists.

First, we are forced to define as private the activities of

large bureaucracies which are de facto public, i.e. affect large numbers of people and governmental capacities. Such a distinction deprives us of an opportunity to redefine public and private in a way that government activities are only one, very important component of public activities. While we may have to continue to conveniently utilize the distinction between 'public' and 'private' in International Law there is no reason why we should teach only 'public' law.

Second, and a restatement of what was alluded to earlier, we routinely equate all policy outcomes. Accordingly, every legal stand by the U.S. - whether with respect to acid rain, tariffs, military alliances or intervention - will be assigned to the state. This means that instances in which the government provides the main impetus for military alliances, will not be distinguished - except perfunctorily - from instances such as acid rain, where corporate or other domestic interests have played a primary role. The inclusion of economic law in the teaching of International Law courses can go beyond the discussion state economic law, e.g., global conferences and associations (GATT, EEC) which should be emphasized. Commercial government to government agreements are worth following as are agreements between corporations and governments and between corporations. Particular emphasis, however, should be placed on agreements and laws dealing with the transfer of capital, whether that is financial or industrial. This primacy is justified by the important domestic adjustments that are usually necessary in

order to attract foreign capital. These IRL adjustments may range from labor laws to the restructuring of the banking system.

One of the goals of such an approach could be to go beyond taxonomy. We could, possibly, examine the degree to which state rights (other than property rights when the state is itself an entrepreneur) and property rights mix, as well as why and how sovereign rights are constrained. Inasmuch as these two sets of rights are largely vested in two different types of agents - governments and corporations - it is the relative capacity of each that is under review.

Regimes and IL. It is not possible to study regimes and institutions without considering their legal components and underpinnings. Moreover, the previous suggestions regarding legitimate orders and the formation of law make little sense without the assumption of a larger context within which law exists and functions.

Political scientists with an interest in IL should take a close look at the formation, content and role of regimes and institutions. Much available literature exhausts itself with the suggestion that some type of historical conjuncture -such as the existence of a hegemon- may result in regimes. The study of the internal structures of regimes -where they exist or are being formed- is an additional step which requires a more detailed understanding of the formation and meaning of principle, rules and procedures.

Concluding Remarks

My remarks do not constitute a 'tightly coupled' system, although they are informed by certain basic assumptions. Political scientists with an interest in IL stand to reclaim a great deal of ground if we establish ourselves as students of IL as a social product. This entails that we add to the study of law as consensus or instrument the study of law as discourse and as an element in the organization of legitimate power relations.

I feel that it is imperative that we keep clear the distinction between accepted law and its efficacy, on one hand, and the location and formation of law in the larger whole, on the other. Unless we also teach the latter, however, we may not be able to offer more than what law schools already offer.

Such an endeavour, however, is not a matter of personal choice and only that. Academic and philosophical factors militate against the breathing space that would be required for such an attempt at a personal level. Larger groups, such as the IL section of the ISA could initiate such a shift by aggressively pursuing collaborations -such as a panels- with other sections, particularly the Environment, IGO and Political Economy sections.